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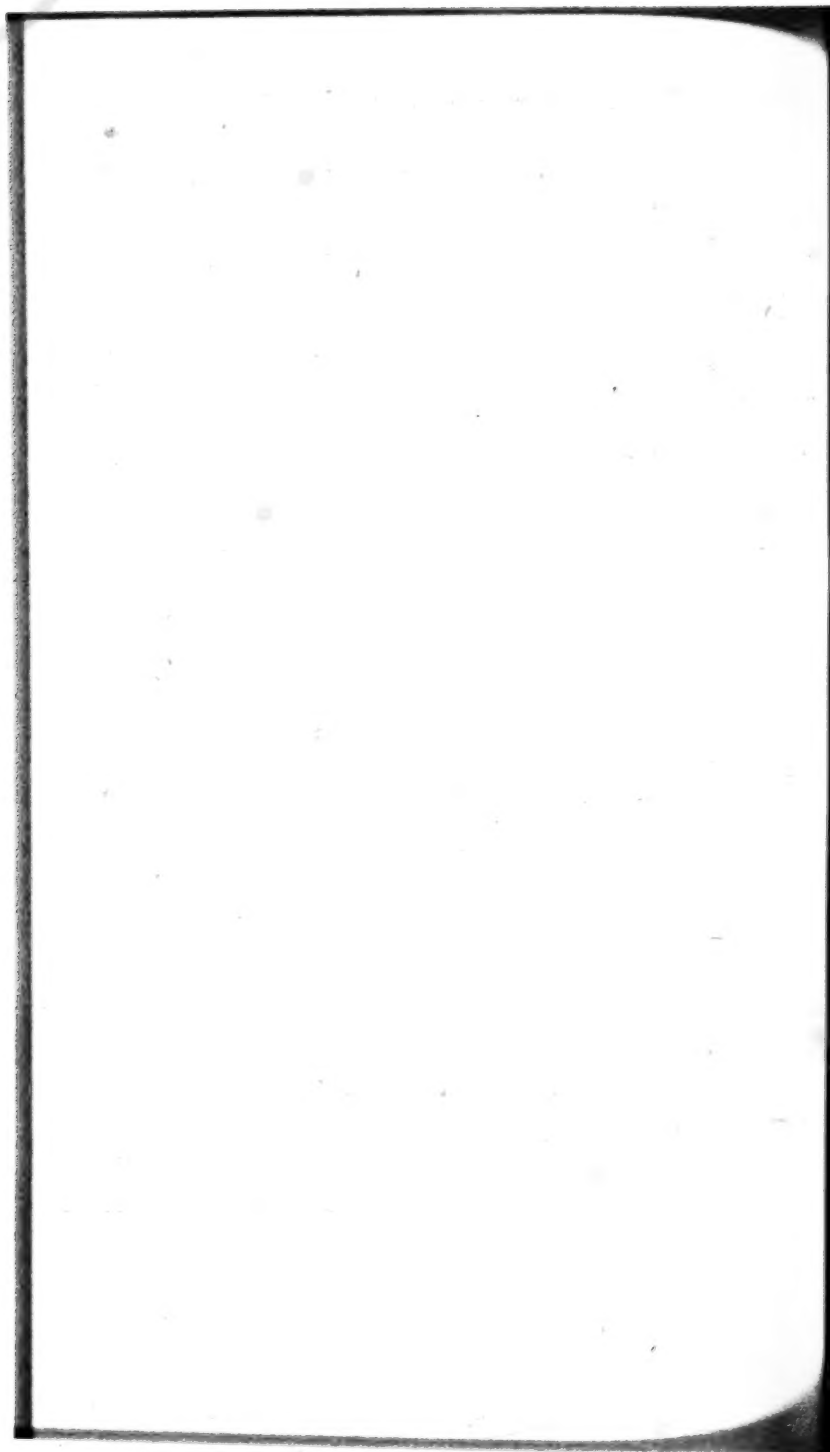
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-206

JACOB J. PARKER, ET AL., APPELLANTS

v.

HOWARD B. LEVY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A) is reported at 478 F. 2d 772. The memorandum opinion of the district court, filed on June 30, 1971 (J.S. App. C), is not reported.

JURISDICTION

Appellee Howard B. Levy filed a petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania, challenging his court-martial conviction under Articles 90, 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. 890, 933 and 934. The district court denied the petition on June 30, 1971, and Levy appealed.

On April 18, 1973, the United States Court of Appeals for the Third Circuit entered a judgment of reversal (J.S. App. B), together with an opinion (J.S. App. A) holding that Articles 133 and 134 are unconstitutionally vague and overly broad and that joint consideration of the Article 90 charge with the charges under Articles 133 and 134 prejudiced Levy's right to a fair trial under Article 90. A notice of appeal to this Court (J.S. App. D) was filed with the court of appeals on May 16, 1973, and the appeal was docketed on July 30, 1973. On October 23, 1973, this Court postponed further consideration of the question of jurisdiction to the hearing on the merit (see Point I, *infra*).

STATUTES INVOLVED

Article 90 of the Uniform Code of Military Justice (10 U.S.C. 890) provides:

Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

Article 133 of the Uniform Code of Military Justice (10 U.S.C. 933) provides:

Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

Article 134 of the Uniform Code of Military Justice (10 U.S.C. 934) provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to hear this appeal.

2. Whether Articles 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. 933 and 934, are unconstitutional as applied to the conduct in this case.

3. Whether Articles 133 and 134 are unconstitutional on their face.

4. Whether, assuming that Articles 133 and 134 were properly held unconstitutional, appellee was denied a fair trial on the Article 90 charge, for the direct disobedience of a lawful order, because of the introduction of evidence on charges under the unconstitutional articles.

STATEMENT

On June 2, 1967, appellee Howard B. Levy, then a captain in the United States Army, was convicted by general court-martial of violations of Articles 90, 133, and 134 of the Uniform Code of Military Justice, 10 U.S.C. 890, 933, and 934. Captain Levy, a doctor, had entered the Army under the "Berry Plan" (see 50 U.S.C. App. 454), under which he agreed to serve for two years if permitted first to complete his medical training. See *United States v. Levy*, 39 C.M.R. 672, 675. From the time he entered on active duty in July 1965 until his court martial, Captain Levy was assigned as chief of the dermatology service, U.S. Army Hospital, Fort Jackson, South Carolina.

1. Article 90 provides for punishment of anyone subject to the Code who "willfully disobeys a lawful command of his superior commissioned officer." The specification under Article 90 (Charge I) alleged that Captain Levy willfully disobeyed a colonel's command "to establish and operate a Phase II Training Program for Special Forces AidMen in dermatology in accordance with *Special Forces AidMen (Airborne)*, 8-R-F16, *Dermatology Training* * * *" (J.S. App. A, p. 2a).

The evidence admitted under this specification showed that one of the functions of the hospital to which Levy was assigned was to train special forces aidmen (Tr. 221-223, 232).¹ Each student was scheduled to spend two hours each day for one week at the

¹ "Tr." refers to the transcript of the court-martial trial, which is part of the record below.

dermatology clinic to receive training in the identification and treatment of certain skin disorders and diseases (Tr. 228, 232). As chief of the dermatology service (and the hospital's only trained dermatologist), Captain Levy had the responsibility to conduct this training (Tr. 227-232). During early 1966 he did so, and continued through the summer, but with increasing irregularity and incompleteness (Tr. 228-230, 527, 541, 556).

In the late summer of 1966, after receiving reports that the dermatological training of the students was unsatisfactory, Colonel Henry Fancy, the hospital commander (Post Surgeon) who was responsible for all medical training conducted in the hospital (Tr. 222-223), told his Plans and Training personnel that he wanted the program carried out (Tr. 229, 230). In early October 1966, Colonel Fancy decided to investigate the problems of the training program in greater detail; he undertook this investigation because of an interview with Agent James West of Military Intelligence regarding a security check of Captain Levy (Tr. 229-231). At the interview with Agent West, Colonel Fancy did not discuss the reports he had received that the dermatological training was unsatisfactory since he was uncertain of their accuracy (Tr. 253).

Colonel Fancy investigated the training program and determined that Captain Levy had totally neglected his duties (Tr. 229-231). He therefore decided to take "relatively strong action" to assure training in basic dermatology (Tr. 231). In his next meeting

with Agent West, Colonel Fancy told him that he planned to order Captain Levy to provide instruction for special forces aidmen (Tr. 254).

On October 11, Colonel Fancy called Captain Levy to his office and personally handed him a written order to conduct the required training (Tr. 231, 232). Colonel Fancy explained that as hospital commander he was ultimately responsible for the program, that Captain Levy was his chief and only dermatologist, and that he expected Levy to teach the aidmen (Tr. 232). Colonel Fancy testified that at the time he gave the order it was his "personal feeling and hope" that Levy would comply (Tr. 244-245; cf. Tr. 524). Colonel Fancy explicitly denied that he gave the order solely to punish Captain Levy for past derelictions (Tr. 245; cf. Tr. 524).²

Upon reading the order, Levy stated that he understood it, but announced that he would not obey it because of his medical ethics (Tr. 232, 233, Pros. Ex. 2). He was told that obedience was nevertheless expected (Tr. 233). Captain Levy persisted in his refusal and refused to have others conduct the training for him (Tr. 528, 529, 532, 545). His enlisted subordinates offered to conduct the necessary training in the derma-

² This account of the discussion between Colonel Fancy and Captain Levy is based upon the testimony of Colonel Fancy. Sergeant Herman Cornell, who worked in the Plans and Training office in the fall of 1966, testified that after returning from a trip on October 12 he discussed training programs with Colonel Fancy, who said that he was quite concerned about the training program and indicated that if he could not get dermatology taught he would have to get permission to omit that portion of the training (Tr. 555; 559-560).

tology clinic, but Captain Levy ordered them not to do so and threatened to punish them if they disobeyed his order (Tr. 531, 537). He was determined that the student aidmen would not receive any training in any area of his responsibility and used his rank as an officer to carry out that determination (see *United States v. Levy, supra*).

Continued efforts by Colonel Fancy to evaluate the progress of the training program following the order of October 11 confirmed that Captain Levy was persisting in his refusal to comply.³ Colonel Fancy delivered to Levy a letter, dated October 14, stating that critiques of the training program would be conducted on October 28 and November 23, 1966 (Tr. 239-241, Pros. Ex. 3). The report following the evaluation on October 28 showed that the training in dermatology was still not being conducted (Tr. 241). On November 4, Colonel Fancy prepared another letter giving Levy the results of the October evaluation and offering any necessary assistance in establishing an adequate program (Tr. 241-242, Pros. Ex. 4).

After the critique of November 23 was conducted, Colonel Fancy reviewed the final evaluation in detail and decided that disciplinary action was necessary (Tr. 256-257). He therefore began preparing an "Article 15" (non-judicial) form of punishment (Tr.

³ After discovering that Captain Levy was not going to train Special Forces aidmen, Colonel Fancy devised what he regarded as a "second-rate" solution to the problem (Tr. 264). He asked the Chief of the Department Hospital Clinics to request that his general doctors, insofar as they could, familiarize aidmen with common skin diseases; he also asked a civilian dermatology consultant to give lectures on a limited basis (Tr. 264-265).

257). Charges under Article 15 were drawn up and sent to the Staff Judge Advocate's Office (Tr. 258-259). Before imposing punishment, however, Colonel Fancy was advised by the intelligence office that he should read the current "G-2 dossier" on Captain Levy (Tr. 259). Colonel Fancy did so. After conferring with legal officers, and in view of information in the dossier suggesting *inter alia*, violations of Articles 133 and 134 of the Code, he terminated the non-judicial punishment proceedings, since he concluded that a court-martial would be more appropriate (Tr. 259-261).

2. Article 134 proscribes, among other things, "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces." Article 133 provides for punishment of "conduct unbecoming an officer and a gentleman."

The specification under Article 134 (Charge II) alleged that (App., p. 7):

Captain Howard B. Levy, U.S. Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did at Fort Jackson, South Carolina, on or about the period February 1966 to December 1966, with design to promote disloyalty and disaffection among the troops, publicly utter the following statements to divers enlisted personnel at divers times: "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered

* The "G-2 dossier" designates a United States Army Counterintelligence Records Facility file.

to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children", or words to that effect, which statements were disloyal to the United States, to the prejudice of good order and discipline in the armed forces.

The specification under Article 133 (Additional Charge I) alleged that (App., p. 8) Captain Levy

did * * * at divers times during the period from on or about February 1966 to on or about December 1966 while in the performance of his duties at the United States Army Hospital, Fort Jackson, South Carolina, wrongfully and dishonorably make the following statements of the nature and to and in the presence and hearing of the persons as hereinafter more particularly described, to wit: (1) Intemperate, defamatory, provoking, and disloyal statements to special forces enlisted personnel present for training in the United States Army Hospital, Fort Jackson, South Carolina, and in the presence and hearing of other enlisted personnel, both patients and those performing duty under his immediate supervision and control and de-

pendent patients as follows: "I will not train special forces personnel because they are 'liars and thieves,' 'killers of peasants,' and 'murderers of women and children,' " or words to that effect; (2) Intemperate and disloyal statements to enlisted personnel, both patients and those performing duty under his immediate supervision and control as follows: "I would refuse to go to Vietnam if ordered to do so. I do not see why any colored soldier would go to Vietnam. They should refuse to go to Vietnam; and, if sent, they should refuse to fight because they are discriminated against and denied their freedom in the United States and they are sacrificed and discriminated against in Vietnam by being given all the hazardous duty, and they are suffering the majority of casualties. If I were a colored soldier, I would refuse to go to Vietnam; and, if I were a colored soldier and if I were sent to Vietnam, I would refuse to fight," or words to that effect; (3) Intemperate, contemptuous, and disrespectful statements to enlisted personnel performing duty under his immediate supervision and control, as follows: "The Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey," or words to that effect; (4) Intemperate, defamatory, provoking, and disloyal statements to special forces personnel in the presence and hearing of enlisted personnel performing duty under his immediate supervision and control, as follows: "I hope when you get to Vietnam something happens to you and you are injured," or words to that effect; all of which statements were made to persons who knew that the said

Howard B. Levy was a commissioned officer in the active service of the United States Army.⁵

⁵ There were two additional charges under Articles 133 and 134. The specification under Article 133 (Additional Charge II) alleged that (App. pp. 9-10) Captain Levy

"with intent to impair and interfere with the performance of duty of a member of the military forces of the United States, did, at or near Columbia, South Carolina, on or about September 1965, conduct himself in a manner unbecoming an officer and gentleman by wrongfully and dishonorably communicating by mailing to Sergeant First Class Geoffrey Hancock, Jr., a member of the United States Army then stationed in Viet Nam, and known by the said Captain Howard B. Levy to be so stationed, but not personally known to him, a letter written by his (Levy's) own hand containing the following statements:

"Dear Geoffrey:

"Let me begin by introducing myself. My name is Howard Levy. I am an Army Dermatologist at Fort Jackson, S.C. * * * I would not attempt to contest your views on the military situation there although I would suggest that you read (if you have not already done so) Jules Roy's book, 'The Battle of DienBienPhu'. I am, however, deeply distressed at your reasons for fighting in Viet Nam. I am one of those 'people back in the States' who actively opposes our efforts there & would refuse to serve there if I were so assigned. * * *"

"The only question that remains, is essentially 1) were we merely naive and therefore did we make unintentional mistakes or 2) does the U.S. foreign policy represent a diabolical evil. As you would guess, I opt for the second proposition. * * *"

"Is Communism worse than a U.S. oriented Government? * * * Are the North Viet Nameese worse off than the South Viet Nameese? I doubt it. * * *"

"Geoffrey who are we fighting for? Do you know? Have you thought about it? You're [sic] real battle is back here in the U.S. but why must I fight it for you? The same people who suppress Negroes and poor whites here are doing it all over again all over the world and your [sic] helping them. Why? You, no doubt, know about the terror the whites have inflicted upon Negroes in our country. Aren't you guilty of the same

The evidence under Articles 133 and 134 established that during 1966, while on duty in the dermatology clinic, Captain Levy, upon many occasions, initiated and engaged in conversations, many of them completely onesided, with aidmen undergoing training, patients and visitors. His remarks—as above set forth—were directed to enlisted personnel, many of them black; the court of appeals cited the remarks reproduced under the Article 134 specification

thing with regard to the VietNameese? A dead women is a dead woman in Alabama and in Viet Nam. To destroy a child's life in Viet Nam equals a destroyed life in Harlem. For what cause? Democracy, Diem, Trujillo, Batista, Chang Kai Shek, Franco, Tshombe—Bull Shit? * * *

"I would hasten to remind you that despite your obvious courage and enthusiasm Viet Nam is not our country and you are not a VietNameese. At least the Viet Cong have that on their side. * * * Geoffrey these people may not be sophisticated (American Style) but their [sic] grown men and women who have a right to live and choose their own government. You know they're even allowed to make a mistake—at least let them make it—don't make it for them. * * *,"

or words to that effect.

The specification under Article 134 (Additional Charge III) (App., p. 10) alleged that Captain Levy did "advise, counsel, urge and attempt to cause insubordination, disloyalty and refusal of duty by a member of the military forces of the United States" by mailing the same letter to Sergeant Hancock "with intent to interfere with, impair, and influence the loyalty, moral and discipline of the military forces of the United States." (The charges are reprinted in full in the Appendix, pp. 7-11.)

The court martial returned a finding of guilty of a lesser included offense as to these two charges by substituting the phrase "culpable negligence" for the "intent" requirements in both specifications. Prior to sentencing, these charges were dismissed by the law officer on motion of the government on the ground that such findings were tantamount under the UCMJ to an acquittal on those charges (Tr. 2600, 2602, 2616-2621).

(Charge II) as illustrative (J.S. App. A, pp. 3a-4a). These remarks, and many others in a similar vein, were made by Levy, to enlisted personnel, in a crowded and busy clinic that averaged a daily case-load of some 50 to 70 military and civilian patients. *United States v. Levy, supra*, 39 C.M.R. at 674-675.

3. Captain Levy was convicted under Article 90 of willful disobedience of the lawful command of his superior officer. He was also convicted under Articles 133 and 134 of uttering public statements designed to promote disloyalty and disaffection among the troops and, further, of "wrongfully and dishonorably making intemperate, defamatory, provoking, contemptuous, disrespectful and disloyal statements" to enlisted personnel. He was sentenced to dismissal from the service, forfeiture of all pay and allowances, and confinement for three years at hard labor. Levy exhausted his appeals within the military system and sought relief in the federal civilian courts before, during, and after the military proceedings against him (*id.* at 6a-7a).

Levy ultimately filed a petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania.* The petition raised a variety of procedural, evidentiary, and constitutional issues, including the claim that Articles 133 and 134 are unconstitutionally vague. The district court denied the petition in a memorandum opinion and order (J.S. App. C, pp. 98a-104a).

*Levy's confinement was due to expire on August 14, 1969. After Levy filed his petition for habeas corpus, Mr. Justice Douglas on August 2, 1969, released him on bail (396 U.S. 1204).

The court of appeals reversed. In a lengthy opinion, the court first analyzed Articles 133 and 134 (commonly known as the "General Articles") and found them impermissibly vague and lacking in specific standards by which the lawfulness of particular forms of conduct could be measured (J.S. App. A, pp. 1a-97a).⁷ The court recognized that Captain Levy's conduct fell within the explicit description of the ambit of Article 134 contained in the *Manual for Courts-Martial* (1969), which is promulgated by the President by executive order. It stated (J.S. App. A, pp. 45a-46a):

Neither are we unmindful that the *Manual for Courts-Martial* offers as an example of an offense under Article 134, "praising the enemy, attacking the war aims of the United States, or denouncing our form of government." With the possible exception of the statement that "Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children," it would appear that each statement for which [Levy] was court-martialed could fall within the example given in the *Manual*. * * *

The court concluded, however, that the possibility that the provision could be applied to conduct within the area of protected First Amendment expression was sufficient to confer standing on Levy to challenge the potential vagueness of the provisions as they might be

⁷ In a companion case now before this court, *Secretary of the Navy v. Avrech*, No. 72-1713, probable jurisdiction noted October 9, 1973, the government has appealed from a decision by the Court of Appeals for the District of Columbia which also struck down Article 134 on vagueness grounds.

applied to others (*id.* at pp. 45a-47a). The court concluded its discussion of the General Articles by declaring that its decision should be afforded prospective effect, except as to persons who have asserted and preserved the constitutional claim and currently have such a claim pending in the military judicial system or the federal court system (*id.* at p. 51a). See *Wainright v. Stone*, No. 73-122, decided November 5, 1973 (*per curiam*).

The court also overturned Captain Levy's conviction for willful disobedience of a valid order, in violation of Article 90, because it concluded that the joint trial of that charge with the charges under the General Articles created a "reasonable possibility" of prejudice, so that a new trial was required (*id.* at pp. 51a-59a). Chief Judge Seitz dissented from this portion of the court's holding. He stated that the court applied the wrong standard in reviewing the joinder problem—the standard, in his view, should have been one of "substantial prejudice" rather than "reasonable possibility of prejudice"—and that, regardless of the standard, the evidence of Captain Levy's guilt on the Article 90 charge was so overwhelming that habeas corpus relief was inappropriate (*id.* at pp. 84a-95a).

The court of appeals remanded the case to the district court for the issuance of the writ of habeas corpus unless within 90 days the military authorities granted Captain Levy a new trial on the Article 90 charge (J.S. App. B, pp. 96a-97a). The court of appeals subsequently stayed its mandate pending appeal to this Court (App., p. 6).

SUMMARY OF ARGUMENT

I

This Court has jurisdiction under 28 U.S.C. 1252, to hear appeals from judgments of courts of appeals, where an Act of Congress is held unconstitutional in cases where the United States is a party. The appeal statute, Section 1252, expressly authorizes appeal from "any court of the United States" and that term is defined in 28 U.S.C. 451 to include "courts of appeals." Moreover, a reference to the source of Section 1252, the Act of August 24, 1937, substantiates that the phrase "any court of the United States" includes courts of appeals, and that appeals may be taken from those courts to this Court. In any event even if the appeal was improvidently taken, the appeal papers may and should be treated as a petition for a writ of certiorari. 28 U.S.C. 2103.

Appellee's other jurisdictional contentions, concerning the signing and service of the notice of appeal are frivolous. The notice was signed by an Assistant United States Attorney for the Eastern District of Pennsylvania on behalf of the United States Attorney for that district. This was done because the Third Circuit Court of Appeals, in which the notice was filed, is in the Eastern District of Pennsylvania. As to the contention that the certificate of service filed in the court of appeals, was not signed by a member of this Court, we note that there is no claim that the notice was not served in compliance with the rules of this Court, or that the certificate service did not comply with the rules of the court of appeals in which it was filed.

II

The court below held the General Articles void on their face for vagueness and overbreadth. While we will argue that these holdings are erroneous (*infra*, IV), our first submission is that the court acted improperly in judging the statutes on their face. This contention with respect to Article 134 is made in our brief in *Avrech*; here we consider the court's facial approach to Article 133. We believe that the court should have evaluated that Article in its application to Captain Levy's conduct. If Captain Levy had "fair warning" that his conduct was proscribed by the Article, the Article should have been sustained as applied to him. While this Court on occasion invalidated statutes on their face, without regard to their application to a particular case, where they directly impinge upon First Amendment interests, we submit, for several reasons, that this approach should not be applied to the military Articles.

In the first place the military officer is a presidential appointee of high honor and responsibility. He is part of a specialized society with a history, tradition and disciplinary needs unfamiliar to civilian society and civilian courts. To insure the high character of its officers, the military has punished conduct unbecoming an officer since the founding of the Republic. This Court has long recognized that the traditions of the military give content to the general language of the Article. *United States v. Fletcher*, 148 U.S. 84. Moreover, the recognized necessary restrictions on freedom of speech in the armed services (see Emerson, *Toward*

a *General Theory of the First Amendment*, 72 Yale L.J. 877, 935 (1963)) suggest that civilian courts should not strike down military laws on their face because of an alleged "chilling effect" on First Amendment rights. Finally, facial invalidation is inappropriate where a statute, like Article 133, forbids primarily nonexpressive conduct and has only marginal application to speech. *Broadrick v. Oklahoma*, No. 71-1639, decided June 25, 1973.

III

Articles 133 and 134 are not unduly vague as applied to Captain Levy's conduct. While he was on active duty at an army hospital in Fort Jackson, Captain Levy persistently and openly criticized American involvement in Vietnam in the presence of enlisted men, stating that he would refuse to go if ordered and urging black soldiers to refuse to go to Vietnam and to refuse to fight once there. He characterized special forces personnel as liars, thieves and killers of women and children. The specification of Article 133 additionally charged that he told enlisted men under his supervision that he had refused to obey the commander's order to train special forces aidmen. It is simply inconceivable that Captain Levy would not have known that his conduct was disruptive of good military order and discipline and unbecoming to him as an officer and a gentleman. If he had any doubt, a reference to the *Manual for Courts-Martial*, a definitive publication promulgated by the President, would have quickly told him that his conduct was prohibited.

IV

If contrary to our submission, the General Articles should be judged on their face rather than as applied, we submit that they are neither unduly vague or overly broad. Our discussion of the facial validity of Article 134 is contained in our brief in *Avrech*; and we here consider only Article 133. While the language of Article 133 is general, the military gives specificity to the Article in a number of ways. Military judicial construction has limited the scope of the Article to serious derelictions. *United States v. Wolfson*, 36 C.M.R. 722; *United States v. Howe*, 17 U.S.C.M.A. 165, 176-178. Moreover, the *Manual for Courts-Martial* contains a lengthy discussion and examples of violations of the Article. This articulation of meaning of the general language of Article 133, together with the well-known traditions of the service, is sufficient to overcome any vagueness challenge. Cf. *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, No. 72-634, decided June 25, 1973.

Nor is Article 133 overly broad. In terms the Article is not directed at speech at all; it prohibits any actions that are unbecoming to an officer and a gentleman. Speech related activities are only a small portion of the Article's coverage. In these circumstances, the Article is not overly broad. *Broadrick v. Oklahoma*, *supra*. To the extent that the Article restricts speech it does so properly. The rights of speech in the military are necessarily more limited than those in civilian society. The special responsibilities of a military officer

require that he, even more than an enlisted man, exercise good judgment in his expressive activities. The free and open debate which is vital for a civilian society could undermine civilian control of the military, if engaged in by ranking military officers. Given these necessary limitations on freedom of speech in the military, to the extent that Article 133 forbids speech which "undermine[s] the effectiveness of response to command" (*United States v. Priest*, 21 U.S.C.M.A. 564, 570), it does not offend the First Amendment.

V

Even assuming that the General Articles are unconstitutional, the conviction under Article 90 for willful disobedience of a lawful order should stand. The court below held that Captain Levy had been denied a fair trial on the Article 90 charge by reason of its joint trial with the Article 133 and 134 charges. In the first place the court applied an incorrect standard in reviewing that conviction. The standard should not have been whether the joint trial created "a reasonable possibility of prejudice," but whether the joinder "substantially prejudiced" Captain Levy's right to a fair trial under the Article 90 charge.

In fact Captain Levy was not prejudiced at all by the joint trial. His principal defense was that the order, which he concededly disobeyed, was illegal because it was motivated solely by a desire to increase the possible punishment. However, the evidence that this was not his commander's primary motivation was overwhelming. Moreover, much of the allegedly prejudicial material of which Captain Levy now com-

plains was brought out by Levy himself in his attempt to establish his commander's unlawful motivation.

ARGUMENT

I

THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL

On October 23, 1973, this Court postponed further consideration of the question of jurisdiction to the hearing on the merits. Accordingly, we shall first show that the case is properly before the Court.

In his Motion to Dismiss or Affirm, Levy raised two jurisdictional questions. He questioned (Motion to Dismiss or Affirm, p. 7, n. 11) whether an appeal from the court of appeals to this Court would lie under 28 U.S.C. 1252. He also argued (Motion to Dismiss or Affirm, pp. 5-7), that the appeal should be dismissed because the notice of appeal was not properly filed or served.

1. 28 U.S.C. 1252 provides in pertinent part that: "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of *any court of the United States*, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico holding an Act of Congress unconstitutional in any civil action, suit or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party. * * *

(Emphasis supplied.) Levy argues that the unqualified language allowing such appeals from decisions of "any

court of the United States" should be interpreted to permit appeals only from district court decisions and that accordingly the government should have proceeded by certiorari rather than by appeal. There is no indication, however, that Congress did not intend this broad phrase to mean what it says. "Any" court of the United States includes courts of appeals as well as district courts. "[T]he Reviser's Notes, which specifically mention courts of appeals, indicate that the language of the Section was deliberately chosen so as to allow appeals from any federal court decisions holding federal laws invalid." Stern and Gressman, *Supreme Court Practice* (4th ed.) § 2.5, p. 31, n. 3. The Reviser's reference to courts of appeals is supported by the definitional section, 28 U.S.C. 451:

As used in this title: The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts * * *.

The conclusion that Section 1252 covers appeals from courts of appeals is confirmed by its legislative history. Section 1252 originated as Section 2 of the Act of August 24, 1937, (50 Stat. 751, 752, H.R. 2260, 75th Cong., 1st Sess.). That Act, in Section 1, required "any court of the United States" to notify the Attorney General of any case between private litigants in which the constitutionality of an Act of Congress was drawn into question, and to permit the United States to intervene in any such proceedings. Section 2 authorized appeal from "any court of the United States" to the Supreme Court in any proceedings "to which the United States * * * is a party

* * * and in which the decision is against the constitutionality of any Act of Congress * * *." Section 5, in close juxtaposition to Section 2, defined the term "court of the United States" to include any "circuit court of appeals." That the notification, intervention and appeal process was intended to apply to the court of appeals, if the constitutional question or adverse ruling first occurred at that level, is confirmed by Rule 44 of the Federal Rules of Appellate Procedure, which prescribes the mechanism for notifying the Attorney General of constitutional questions arising in the court of appeals.* If the intervention to enable the Attorney General to defend the constitutionality of the federal statute may take place in that court, so may an appeal from its decision holding the Act unconstitutional.

This Court observed in *Reid v. Covert*, 351 U.S. 487, 490, reheard on other grounds, 354 U.S. 1, " * * * it would do violence to the purpose of Congress to provide a 'prompt review of the constitutionality of federal acts,' *Fleming v. Rhodes*, 331 U.S. 100, 104, to interpret § 1252 restrictively." It is clear therefore that "appeals from the courts of appeals to the Supreme Court are * * * authorized by 28 USC § 1252," Moore, *Manual Federal Practice and Procedure* (1972 ed.), p. 2106. See also Barron and Holtzoff, *Federal*

* The Notes to Rule 44 of the Advisory Committee of Appellate Rules state: "[This rule] is in response to the Act of August 24, 1937 (28 U.S.C. § 2403), which requires all courts of the United States to advise the Attorney General of the existence of an action or proceeding of the kind described in the rule."

Practice and Procedure (1960 ed., revised by Wright), Vol. 1, § 57.*

At all events, even assuming that Section 1252 does not authorize an appeal from a court of appeals, "this alone shall not be ground for dismissal." 28 U.S.C. 2103. That Section provides that where an appeal is improvidently taken from a court of appeals, when certiorari should have been sought, "the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken." If an appeal under Section 1252 does not lie to this Court, then this Court should treat the papers as a petition for certiorari and grant the petition.

2. Levy has also moved to dismiss the appeal on the grounds that the government attorney who filed the notice of appeal to this Court in the Third Circuit Court of Appeals was not counsel of record and never entered an appearance, and that the person certifying service of the notice of appeal is not a member of the bar of this Court (Motion to Dismiss or Affirm, pp. 5-8). These contentions are frivolous.

* Levy's argument that, since Rule 41(b) of the Federal Rules of Appellate Procedure does not explicitly empower a court of appeals to stay its mandate pending appeal to this Court, "there can be no such appeals" (Motion to Dismiss or Affirm, p. 7, n. 11) is illogical. Whatever may be said about appeals under Section 1252, the rules explicitly provide for appeals from courts of appeals in some circumstances. 28 U.S.C. 1254(2). The proper inference to be drawn from these provisions is only that, since appeals to this Court may be taken from courts of appeals, those courts have power to grant stays pending such appeals. Cf. Rule 62(g), Fed. R. Civ. P.

In regard to Levy's assertion that the notice of appeal was filed and certified by "legal strangers" to the litigation, the names appearing on the government's notice of appeal are Robert E. J. Curran, United States Attorney for the Eastern District of Pennsylvania and Carmen C. Nasuti, an Assistant United States Attorney in that office (J.S. App. D, p. 105a). Service of the notice was certified by Nasuti (J.S. App. D, p. 106a). This case was handled in the lower courts by the United States Attorney's Office for the Middle District of Pennsylvania. For reasons of geographical convenience, the government attorneys in the Eastern District, where the court of appeals is situated, were asked by government counsel of record to file and serve the notice of appeal to this Court. Levy does not contend that this procedure deprived him of actual notice of the government appeal.

The claim that this Court is without jurisdiction because the person certifying service of the notice of appeal is not a member of this Court is equally insubstantial. Rule 10 of the Rules of this Court requires that the notice of appeal be filed with the clerk of the court of appeals and served on all parties "in the manner prescribed by Rule 33 [of the Rules of this Court]." There is no suggestion that the "manner" of service did not comply with Rule 33 of the Rules of this Court and there is no suggestion that the filing of the notice and certificate of service in the Third Circuit did not comply with the rules governing that court. See Rule 25(a), (d), Fed. R. App. P. In any event, such technical non-compliance, if any, with this Court's Rules concerning the form of proof of service is

not a jurisdictional defect warranting dismissal of the appeal. See, *In re McCulloch*, 100 F. 2d 939 (C.A. 7). Like Levy's contention concerning the alleged deficiency in the signing of the notice of appeal, Levy suffered no prejudice from any defect in the certificate of service.

II

THE COURT OF APPEALS IMPROPERLY DETERMINED THE CONSTITUTIONALITY OF ARTICLES 133 AND 134 ON THEIR FACE; IT SHOULD HAVE DETERMINED WHETHER THE ARTICLES ARE UNCONSTITUTIONAL AS APPLIED

The court of appeals held Articles 133 and 134 (referred to together as the "General Articles") void on their face for vagueness and overbreadth. In our brief in *Secretary of the Navy v. Avrech*, No. 72-1713," we argued that the court of appeals improperly judged the validity of Article 134 on its face, rather than as applied. Much of what we said in that brief applies to our contention here that the court below improperly assessed Article 133, as well as Article 134, on its face, rather than as applied to Captain Levy's conduct. We therefore refer the Court to that discussion, which supplements our arguments below." In evaluating the General Articles on their face, we will focus principally upon Article 133, although we will necessarily summarize some of what we said in *Avrech*, because of the close relationship of the General Articles.

¹⁰ On October 23, 1973, the Court ordered that argument on the merits in this case would be in tandem with the argument of *Avrech*.

¹¹ We are serving a copy of our *Avrech* brief upon appellee.

As with the court of appeals in *Avrech*, we submit that the court below took the wrong approach in evaluating the constitutionality of Articles 133 and 134. Instead of considering the validity of the provisions as an abstract matter on the basis of hypothetical applications of the General Articles, it should have evaluated their application in this particular case. We believe, and argue below, that Captain Levy was completely aware that his declarations to enlisted personnel, such as "I would refuse to go to Vietnam if ordered to do. * * * If I were a colored soldier I would refuse to go to Vietnam and if I were a colored soldier and were sent to Vietnam I would refuse to fight," were both unbecoming to him as an officer and plainly prejudicial to good military order and discipline. If so, that should have been the end of the matter as far as a civilian reviewing court is concerned. There was no occasion for the court of appeals to strike down Levy's conviction because of its conclusion that in other situations or applications the Articles might not give adequate notice to those charged with violating them. Similarly, if the provisions are constitutional as applied to Levy, there was no reason for the court below to invalidate the Articles for overbreadth on the basis of problems that might arise in their possible application in other situations not before the court.

While this Court, on occasion, has struck down statutes on their face because of their "chilling effect" on the exercise of First Amendment rights, we submit that rationale is not appropriate in determining the constitutionality of the Articles which govern the conduct of members of armed forces. While military of-

ficers have a constitutionally protected right of free speech, the special character of the military community and the special responsibilities of military officers require a different approach in determining how the First Amendment guarantees are to be applied to them. To develop this analysis, it is necessary first to describe the unique character of the military community (see U.S. Br. in *Avrech*, pp. 13-18) and the particular role played by officers (*infra*, A).

A. THE MILITARY OFFICER REPRESENTS A SPECIAL TRADITION AND
HOLDS UNIQUE RESPONSIBILITIES

A military officer is a governmental appointee of special honor and responsibility. He receives his commission from the President of the United States. *United States v. Mouat*, 124 U.S. 303. "The President's commission * * * recites that 'resposing special trust and confidence in the patriotism, valor, fidelity and abilities' of the appointee he is named to a specified rank during the pleasure of the President." *Orloff v. Willoughby*, 345 U.S. 83, 91.

The officer holds a position of responsibility and command in the armed forces, whose central mission is "to fight or be ready to fight wars." *Toth v. Quarles*, 350 U.S. 11, 17. He may hold the awesome responsibility to "commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself." *United States v. Priest*, 21 U.S. C.M.A. 564, 570.

Because officers may carry great responsibilities, the military has historically required an especially high standard of conduct for them. In 1775 the Continental Congress adopted for its army, *in haec verba*,

Article XXIII of Section XV of the British Articles of War of 1765:

Whatsoever commissioned officer shall be convicted before a General Court-martial, of behaving in a scandalous, infamous Manner, such as is unbecoming the Character of an Officer and a Gentleman, shall be discharged from [the] Service.¹²

This Article was reenacted in 1776. In 1786 the provision was enacted again, with no change in text.

The scope of the Article was enlarged in the Articles of War of 1806 which, omitting the terms "scandalous" and "infamous," provided that "[a]ny commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed from the service." Winthrop, *Military Law and Precedents* (2d ed., 1920), p. 983. The effect of the revision was to broaden the scope of the Article and "thus * * * to establish a higher standard of character and conduct for officers of the army." Winthrop, *supra*, pp. 710-711.¹³ These early enactments of Article 133 are indicative of its conformity of contemporary understanding of accepted standards of conduct for military officers. Cf. *United States v. Barnett*, 376 U.S. 681, 693; *Stuart v. Laird*, 1 Cranch 299, 309. See *United States v. Howe*, 17 U.S.C.M.A. 165, 174. The Article has remained basically un-

¹² Winthrop, *Military Law and Precedents* (2d ed., 1920), pp. 945, 957. Bracketed material indicates a change in the American Article.

¹³ "At the same time the original phraseology is properly borne in mind as indicating that, to become the subject of a charge, the unbecoming conduct should not be slight but of a material and pronounced character." Winthrop, *supra*, p. 711.

changed through various reenactments since 1806, until enacted as Article 133 in 1951.¹⁴

As we discussed on our brief in *Avrech* (pp. 17-18), civilian courts have long "supported the military establishment's broad power to deal with its own personnel," Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962), and this Court has explicitly refused to interfere with the military's appointment of officers. *Orloff v. Willoughby*, 345 U.S. 83.

In *United States v. Fletcher*, 148 U.S. 84, decided in the last century, this Court recognized the special competence of the military to assess conduct unbecoming an officer. The Court rejected Captain Fletcher's argument that the court martial could not properly have held that his refusal to pay a just debt was conduct unbecoming an officer. 148 U.S. at 91-92. The Court's brief discussion of the subject followed the reasoning of Judge Nott in the Court of Claims decision in the same case (*Fletcher v. United States*, 26 Ct. Cl. 541), which stressed the "higher code termed honor" of military officers and the unfamiliarity of civilian courts with military standards of conduct (26 Ct. Cl. 562-563):

It is hard for the trained lawyer to conceive of an indictment or declaration which should allege that the defendant defrauded A or B by

¹⁴ The legislative background is documented in Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357, 358 (1968); see also Winthrop, *supra*, p. 710. Over the years the Article has been made to apply to "cadets" and "midshipmen" as well as officers, and the mandatory punishment of dismissal has been eliminated. See *United States v. Howe*, *supra*, 17. U.S.C.M.A. at 176.

refusing to return to him the money which he had borrowed from him. Our legal training, the legal habit of mind, as it is termed, inclines us to dissociate punishment from acts which the law does not define as offenses. As one of our greatest writers of fiction puts it, with metaphysical fitness and accurate sarcasm, as she describes one of her legal characters, "His moral horizon was limited by the civil code of Tennessee." * * * We learnt as law students in Blackstone that there are things which are *malum in se* and, in addition to them, things which are merely *malum prohibitum*; but unhappily in the affairs of real life we find that there are many things which are *malum in se* without likewise being *malum prohibitum*. In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code. * * *

Both Articles 133 and 134 are stated in general terms, and have acquired their meaning by military custom and experience. Thus the early cases, cited in our brief in *Avrech* (pp. 15-17), are pertinent here. For example, in *Dynes v. Hoover*, 20 How. 65, the Court observed that any uncertainty a civilian court might have about the meaning of the predecessor of Article 134 was overcome by the practical understanding of men trained in the customs of the services (20 How. at 82):

Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by the practical men in the navy and army, and by those who have

studied the law of courts martial, and the offences of which the different courts martial have cognizance. * * *

See, similarly, *Swaish v. United States*, 165 U.S. 553, 561-562; *Carter v. McClaughry*, 183 U.S. 365, 386-387, 390, 400-401. Cf. *Ex parte Quirin*, 317 U.S. 1, 29-31, 35.

While these cases are old, their observations are pertinent to the military today. The armed forces still need flexible and effective power to enforce the "higher code termed honor" of its officers and to maintain discipline and to punish conduct of any serviceman prejudicial to good order. And it is still true today that any superficial appearance of vagueness in the General Articles is eliminated when they are interpreted, as they must be, in the light of military custom and experience.

B. THE FACT THAT CERTAIN APPLICATIONS OF ARTICLE 133 MAY INVOLVE SPEECH THAT IS PROTECTED BY THE FIRST AMENDMENT DOES NOT REQUIRE THAT THE CONSTITUTIONALITY OF THE ARTICLE BE DETERMINED ON ITS FACE.

As we discuss at greater length in our brief in *Avrech* (pp. 18-19), the traditional rule of constitutional adjudication would not allow a person whose own conduct could constitutionally be regulated by a statute to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others. However, when First Amendment freedoms are at stake, this Court has relaxed traditional rules of standing to permit attack on overbroad statutes by persons whose "hardcore" conduct was clearly proscribed. See *Dombrowski v. Pfister*, 380 U.S. 479,

486; *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-433; *Coates v. City of Cincinnati*, 402 U.S. 611; *Keyishian v. Board of Regents*, 385 U.S. 589. The reason for this relaxed rule of standing is the possible "chilling effect" such statutes might have on the exercise by others of their First Amendment rights.

This principle should not be applied in considering constitutional challenges to the Articles which govern the conduct of military officers and personnel. Unlike civilian society, where the individual is largely left alone by the State and is required only to avoid transgressing well-defined prohibitions, members of the armed forces are required affirmatively to meet certain standards of conduct established largely by tradition and developed in the light of the particular requirements of the military. These obligations are even greater for military officers, commensurate with their greater responsibilities.

As we noted in our brief in *Avrech* (pp. 19-20), the rights of speech of servicemen, while protected by the First Amendment, must in some ways be more limited than those of civilians. As Professor Emerson has stated (*Emerson, Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 935 (1963)): "To a certain extent, at least, the military sector of a society must function outside the realm of democratic principles, including the principle of freedom of expression." The necessity for these limitations on freedom of speech were explicated in a passage from *United States v. Priest*, *supra*, 21 U.S.C.M.A. at 570, quoted in our *Avrech* brief (p. 20): essentially

speech must be limited which has a clear tendency to "undermine the effectiveness of response to command."

It follows, we believe, that as long as Article 133 put Captain Levy on notice that it prohibited his conduct, it was improper for the court below to strike it down because of its alleged chilling effect upon the possible exercise of First Amendment rights of other officers in other situations. Article 133 helps the services insure a high standard of character and honor among its officers. It could not continue adequately to perform that office if its validity were tested not on the basis of its application to particular cases, but in relation to every hypothetical situation that could be imagined.

It is a settled principle of constitutional adjudication that "statutes are not ordinarily invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language" (*United States v. National Dairy Corp.*, 372 U.S. 29, 32). This principle is of special importance in considering statutes governing conduct of military officers. It counsels that the civilian courts should not strike down a long-established and traditional military law because of uncertainty of the validity of its possible application to hypothetical and conjectural situations not involved in the actual case before the court.

This Court, moreover, has been reluctant to declare a statute void on its face when there exists a substantial class of situations to which the statute may be validly applied. See, *e.g.*, *United States v. Petrillo*,

332 U.S. 1, 17; *United States v. Wurzbach*, 280 U.S. 396, 399. Even if a statute is defective in regard to marginal applications, facial invalidation is inappropriate if the "remainder of the statute * * * covers a whole range of easily identifiable and constitutionally proscribable * * * conduct." *United States Civil Service Commission v. National Association of Letter Carriers*, No. 72-634, decided June 25, 1973 (slip op. 31).

Moreover, facial invalidation has been principally applied to statutes which seek to regulate "only spoken words." *Gooding v. Wilson*, 405 U.S. 518, 520. See *Cohen v. California*, 403 U.S. 15; *Street v. New York*, 394 U.S. 576; *Brandenburg v. Ohio*, 395 U.S. 444; *Chaplinsky v. New Hampshire*, 315 U.S. 568. The Court observed in *Broadrick v. Oklahoma*, No. 71-1693, decided June 25, 1973 (slip op. 14) that, "particularly where conduct and not merely speech is involved," facial invalidation is inappropriate unless the overbreadth is "not only * * * real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." As we show below (pp. 40-47), Article 133 does not principally apply to speech and there is "a whole range of easily identifiable and constitutionally proscribeable * * * conduct" (*Letter Carriers, supra*) that it covers.

III

ARTICLES 133 AND 134 ARE NOT VAGUE AS APPLIED TO THE CONDUCT INVOLVED IN THIS CASE

The test for determining whether a statute is impermissibly vague is whether it "conveys sufficiently definite warnings as to proscribed conduct when

measured by common understanding and practices." *Jordan v. DeGeorge*, 341 U.S. 223, 231-232; *Small Company v. American Sugar Refining Company*, 267 U.S. 233, 241-242; see *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502; *Boyce Motor Lines v. United States*, 342 U.S. 337, 340-341; *United States v. Petrillo*, 332 U.S. 1, 8. "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed" (*United States v. National Dairy Corp.*, *supra*, 372 U.S. at 32-33).

Article 133, as well as Article 134, must be judged " * * * not in vacuo, but in the context in which the years have placed it" (*United States v. Frantz*, 2 U.S.C.M.A. 161, 163). So viewed they provided adequate notice to Captain Levy that they prohibited the conduct in which he engaged. Preliminarily, however, it is useful to recall that the "common understanding and practices" (*Jordan, supra*) in which the application Articles are to be judged are those of the military.

We have already noted that a military officer may carry the responsibilities, literally, of the life and death of the men in his command. It would be not practicable nor wise to codify totally the obligations of officers. The circumstances in which an officer is expected to use his good judgment are too protean to be encapsulated in an exclusive listing. As Judge Nott said (*Fletcher v. United States*, 26 Ct. Cl. 541, 563, affirmed, 148 U.S. 84), "[i]n military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable

that the standard of the Army shall come down to the requirements of a criminal code." In the light of the "common understanding and practices" (*Jordan, supra*) of military officers Captain Levy had adequate notice that the General Articles forbade his conduct.

As the specifications under both Articles alleged, while stationed at the Army Hospital at Fort Jackson, Captain Levy persistently and openly criticized American involvement in Vietnam, stated that he would refuse to go there if ordered and urged that black soldiers refuse to go to Vietnam if ordered or to fight once there. Another common theme in Captain Levy's statements was that Special Forces personnel were liars, thieves and killers of women and children. The specification under Article 133 additionally alleged statements by Captain Levy, to enlisted personnel under his supervision, that he refused to obey the Hospital Commander's order to train Special Forces aidmen.

Captain Levy made these statements over a period of months, with complete disregard as to time and place, in a busy hospital clinic with civilian and military patients. The statements were directed to Levy's enlisted subordinates, and especially to black personnel, who might have been particularly susceptible to Captain Levy's arguments linking American involvement in Vietnam with racial suppression in the United States. Captain Levy did not make his statements "behind closed doors but wherever and whenever the occasion presented a likely prospect in which a seed of thought could be planted and for all to hear. Certainly, these utterances were 'Publicly' made."

United States v. Levy, supra, 39 C.M.R. at 678. The statements were volunteered and made under circumstances where open and extensive circulation was guaranteed by virtue of the speaker's rank and position.

It should have been clear to anyone of ordinary intelligence that such behavior was prohibited under Article 134 as "directly and palpably" to the prejudice of good order and discipline. Had Captain Levy desired to evaluate the lawfulness of his conduct, reference to the *Manual* would have resolved any doubts he might have entertained simply from a reading of the statutory provisions he now attacks. The section in the *Manual* outlining types of conduct violative of Article 134 includes a discussion of "disloyal statements undermining discipline and loyalty" (§ 213f (5)). As examples of such misconduct, the *Manual* mentions "utterances designed to promote disloyalty or disaffection among the troops, as praising the enemy" or "attacking the war aims of the United States * * *." The same conduct is listed as violative of Article 134 in the Table of Maximum Punishments (§ 127c) and in the forms for Charges and Specifications (App. 6c).

As the court of appeals observed (J.S. App. A, p. 46a), "[w]ith the possible exception of the statement that 'Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children,' it would appear that each statement for which [Captain Levy] was court-martialed could fall within the example given in the *Manual*." The specification's requirement that the statement be "designed to promote disloyalty or disaffection" was

obviously satisfied in this case. The content of the statements and the circumstances under which they were delivered established Captain Levy's intent.¹³

Nor could any commissioned officer of ordinary intelligence—and *a fortiori* a man as highly educated as Captain Levy—have failed to perceive that such behavior was prohibited by Article 133 as “conduct unbecoming an officer and a gentleman.” The evidence relating to the Article 134 offense is relevant to show a violation of Article 133. Also significant is the additional statement by Captain Levy alleged in the Article 133 specification: “The Hospital Commander has given me an order to train special forces personnel, which order

¹³To prove guilt under the Article 134 specification, the government had to prove beyond a reasonable doubt that the statements were designed to promote disloyalty and disaffection among the troops; that the statements were disloyal to the United States; that the statements had a clear and reasonable tendency to promote disloyalty and disaffection among the troops (actual success in indoctrinating a particular audience is not a required element of proof, *United States v. Batchelor*, 7 U.S.C.M.A. 354); and that the conduct of the accused was “directly and palpably” prejudicial to good order and discipline in the Armed Forces.

Appellee argues (Motion to Dismiss or Affirm, pp. 18-19) that the standard instruction employed in this case—that the statements must have a “clear and reasonable tendency” to promote disloyalty and disaffection—was invalid under the First Amendment and should have been replaced by a “clear and present danger” test. Whatever the merits of this argument with respect to the regulation of speech by civilians, surely the “clear and reasonable tendency” test used here, when combined with the additional requirements outlined above, is sufficient to pass constitutional muster with respect to regulation of active members of the Armed Forces acting within the military setting. Cf. Emerson, *Toward a General Theory of the First Amendment*, *supra*, 72 Yale L.J. at 935-937; *United States v. Voorhees*, 4 U.S.C.M.A. 509.

I have refused and will not obey." Captain Levy did not simply disobey a lawful order; he made a special point of telling his enlisted subordinates what he had done. Such conduct, judged in light of military practice and tradition, clearly exceeded the "limit of [conduct] below which the individual standards of an officer * * * cannot fall without seriously compromising his standing as an officer * * * or his character as a gentleman" (*Manual*, ¶ 212). See *United States v. Howe*, 17 U.S.C.M.A. 165.

IV

ARTICLE 133 IS NOT UNCONSTITUTIONAL ON ITS FACE

If, contrary to our submission, the Court should conclude that the constitutionality of the General Articles should be determined on their face rather than as applied, then we submit that they are neither unduly vague or overbroad. Since we considered the facial validity of Article 134 in our brief in *Avreck* (pp. 27-38), we will here focus on Article 133.

A. ARTICLE 133 IS NOT UNDULY VAGUE

As we explained above, Article 133 is designed to ensure a high standard of conduct of military officers. Its content must be determined by reference to the well-settled traditions and customs of the military. To military officers, it sufficiently specifies what conduct it prohibits to satisfy the constitutional requirement that criminal statutes not be unduly vague.

1. Article 133 has been strictly construed to cover only conduct that violates recognized standards of military behavior. As Article 134 has been interpreted to

reach only conduct "directly and palpably" prejudicial to good order, *United States v. Holiday*, 4 U.S.C.M.A. 454, 456, so Article 133 has been limited to serious derelictions. *United States v. Wolfson*, 36 C.M.R. 722; *United States v. Howe*, 17 U.S.C.M.A. 165, 176-178 (holding that Article 133 is not unconstitutionally vague).¹⁶ The same restriction is noted in Winthrop, *Military Law and Precedents*, *supra*, pp. 711-712:

Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents [footnotes omitted].

A further assurance of "fair warning" is provided by the regular instruction in the Uniform Code of Military Justice which is given to all officers. AR 350-212 (4); cf. 10 U.S.C. 937, Article 137 UCMJ; see our brief in *Avrech*, p. 26).

2. As with Article 134, the *Manual for Courts-Martial* is an important source of guidance for officers as to the requirements of Article 133. AR 350-212(4) requires the officers under a training course in military justice which gives them a thorough exposure to the

¹⁶ The court below (J.S. App. A., p. 23a) stated that it was aware of no decision by the Court of Military Appeals which dealt with the vagueness of Article 133. The court in *Howe* specifically rejected a challenge to Article 133 on the ground of vagueness. 17 U.S.C.M.A. at 176.

Manual. The discussion of Article 133 in the *Manual* (§ 212) gives a number of examples of conduct which will be, and in the past has been found violative of Article 133. While that discussion does not specifically mention conduct such as Captain Levy's, it does warn that "[t]his article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer * * *" (*Manual*, §212). Disloyal statements, as we note in our brief in *Avrech* (p. 29), are specifically prohibited under Article 134.

3. Article 133 is given further definitiveness by the practical requirement that no officer can be convicted thereunder except for conduct that any reasonable officer would know was wrong. Although Article 133 does not in terms require *mens rea*, convictions are practically always for knowing violations of law. Cf. Wiener, *Are the General Military Articles Unconstitutionally Vague?*, *supra*, 54 A.B.A.J. at 364. The specification under Article 133 charges Captain Levy with conduct that he must have known was not permissible activity by an officer in the United States Army. Cf. *United States v. Guest*, 383 U.S. 745, 753-754, 775-786 (holding that a scienter requirement can save a criminal statute from unconstitutional vagueness; *Screws v. United States*, 325 U.S. 91).

4. Given the fact that the armed forces properly require high standards of conduct by its officers, it is fair to ask how, as a practical matter, the scope of Article 133's prohibition could be delineated more clearly than it presently is by the statute itself, the underlying military traditions, the *Manual* and the cases construing its provisions. Wiener, *Are the Gen-*

eral Military Articles Unconstitutionally Vague?, *supra*, 54 A.B.A.J. at 363, puts the question as follows:

[I]t may well be asked how, as a matter of legislative draftsmanship, Congress could effectively proclaim its intent to hold commissioned officers to "a higher code termed honor" lest the standard of the armed forces "come down to the requirements of a criminal code."

What is involved here is a system of values which has been part of the military experience for centuries. While these values are communicated to officers through military customs and usage, and by example, they cannot be exhaustively codified without bringing the standard of conduct expected of officers "down to the requirements of a criminal code."

The decision below, striking down on vagueness grounds the prohibition against "conduct unbecoming an officer and a gentleman," in effect means that the military cannot hold its officers to their traditional high standards of conduct. We submit that the court below did not adequately weigh this Court's early decisions holding that the superficial appearance of vagueness is overcome by military custom and experience—and that at times it disregarded the differences between the civilian and military environments and between military officers and civilian citizens.

The General Articles are not addressed to a civilian society with widely varying subcultures and diverse mores. Rather, these articles are addressed to the specialized military community, which exists for special

purposes. It is a community, moreover, whose practices and traditions, widely known not only within the military but outside as well, have remained substantially intact for centuries. When Article 133 speaks of "conduct unbecoming an officer and a gentleman," it addresses the common understanding of an officer in the performance of his duties. When the court of appeals asks the rhetorical question, "In a society witnessing rapidly changing manners and mores, against what existing standard is gentlemanly conduct to be measured?" (J.S. App. A, p. 42a), it misses the point. There may be no agreed standard of conduct in civilian society, but the traditions, practices and obvious organizational needs of the armed forces provide a clear and commonly understood standard for the military.

B. ARTICLE 133 IS NOT OVERLY BROAD

Article 133 is not in terms directed at speech at all; it prohibits "conduct unbecoming an officer and a gentleman * * *." As shown by the discussion in the *Manual* of the various offenses under that Article (see ¶ 212), in most of its applications Article 133 does not deal with speech-related activities but with conduct that implicates no First Amendment interests. There are only a few instances in which the conduct unbecoming an officer described in the *Manual* relates to speech.

As we have noted (see *supra*, pp. 32-33), it is only with respect to statutes that have a chilling effect upon the exercise of First Amendment rights that this Court has invalidated legislation on its face for over-

breadth, without regard to its impact in the particular case. The alleged overbreadth of Article 133 therefore must be determined not with respect to the probable applications of the Article to the broad gamut of conduct which it covers, but only to the narrower areas in which it operates to penalize speech-related activities.

Article 133 "includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman" (*Manual*, ¶1212). The Article thereby requires officers to live, at least, up to the standards of enlisted men with respect to their expressive activity, as well as other conduct. As we noted in our discussion of Article 134 in our brief in *Avrech* (pp. 34-38), the primary area of impact on speech of the military Articles is with respect to disloyal statements. The lawfulness and propriety of forbidding such utterances in the military is discussed there, and need not be repeated.

The obligation of officers to exercise good judgment with respect to their speech activities is necessarily greater than that of enlisted servicemen. The military must have the right to forbid speech which "undermine[s] the effectiveness of response to command" (*United States v. Priest*, *supra*, 21 U.S.C.M.A. at 570). Intemperate, contemptuous and disrespectful remarks, such as Captain Levy's bragging to enlisted men that "[t]he Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey" (*supra*, p. 10), necessarily undercut "the effectiveness of response to command." The Army could not function effectively if its

junior officers could thus flout the lawful orders of their superiors, and then broadcast their disobedience to men under their control.

Political speeches attacking United States military policy by military officers poses a distinct threat to the civilian control of the military. The danger to civilian control of the military was noted in *Dash v. Commanding General*, 307 F. Supp. 849, 856 (D. S.C.), affirmed on opinion below, 429 F. 2d 427 (C.A. 4) in discussing a request by enlisted men organizing a public meeting to debate the Vietnam War:

[T]o seek to create * * * within the military itself a cohesive force for the purpose of compelling political decisions—and political decisions directly related to the mission of the military itself—would undermine civilian government, especially civil control of the military, and would take from responsible civilian government the power of decision. * * *

These dangers increase with the rank of the officer attacking the war aims dictated by civilian authorities. As Mr. Wiener observed (Wiener, *Are The General Military Articles Unconstitutionally Vague?*, *supra*, 54 A.B.A.J. at 362):

It needs to be re-emphasized that if company-grade officers are free to make public attack not only on the nation's military policy but on the personal integrity of their constitutionally appointed Commander in Chief as well, then general officers would be similarly free to demonstrate and to contradict the President in public. On that view the Joint Chiefs of Staff

would be constitutionally entitled to dispute, with placards and demonstrations and public addresses * * * not only questions of basic military policy, but also the wisdom of basic social and political programs in the civilian area.

These very real concerns entitle the military to require that the expressive activities of its officers not exceed the bounds of propriety.

Nor is there a significant risk that the Article will be used to punish officers for the private expression of ideas. As we have observed (*supra*, p. 41), the statutory reach of Article 133 has been limited to serious derelictions. *United States v. Howe*, 17 U.S.C.M.A. 165, 176-178. See also Winthrop, *Military Law and Precedents*, *supra*, pp. 711-712. Finally, the long-established traditions and customs of the service, which we discuss above (pp. 28-32), help define what is expected of an officer in his speech as well as his non-expressive conduct.

In sum, given the military responsibilities of officers, to the extent that Article 133 restricts speech which "undermine[s] the effectiveness of response to command" (*Priest, supra*), it does not offend the First Amendment.

V

IN ANY EVENT, THE CONVICTION UNDER ARTICLE 90 FOR THE WILLFUL DISOBEDIENCE OF A LAWFUL ORDER SHOULD STAND

The court of appeals held that the joinder of the General Articles charges with the Article 90 charge deprived Levy of a fair trial on the latter charge, and

remanded for a new trial on the latter. We submit, however, that even if Articles 133 and 134 were held unconstitutional, Levy's conviction under Article 90 for the willful disobedience of a lawful order should stand.

As Judge Seitz argued in dissenting from the majority's decision on this point (J.S. App. A, pp. 84a-90a), the court applied the wrong standard in deciding whether Levy had been denied a fair trial on the Article 90 charge. The standard should not have been whether a joint trial of the Article 90 charge created a "reasonable possibility of prejudice," but whether the joinder "substantially prejudiced" Levy's right to a fair trial on that charge. Moreover, the evidence supporting the Article 90 charge was so overwhelming that the Article 90 conviction should stand whatever standard of review is employed.

1. In evaluating the question of prejudicial joinder of offenses in courts-martial, two significant differences from civilian courts must be borne in mind. The first is that in military courts offenses must normally be joined which do not have the same or similar character. Compare, *Manual for Courts-Martial* ¶ 30g, 33h (1969) with Rule 8, Fed. R. Crim. P. Secondly, and by way of compensation for the rule just noted, the military judicial system allows an accused to testify as to any one or more of the charges without waiving his Fifth Amendment right to remain silent on the remaining charges. Thus Captain Levy could have taken the stand on the Article 90 charge without having to testify on the other charges.

As Judge Seitz pointed out (J.S. App. A, pp. 86a-90a), these differences create a situation peculiar to the military, and "federal civilian courts would rarely if ever be faced with reviewing the type of situation with which we are here confronted." Faced with the irrelevance of the existing civilian-court authorities, Judge Seitz formulated an appropriate standard for federal court *habeas corpus* review of military courts: whether the joint trial "substantially prejudiced" the fairness of the remaining constitutionally valid charge. We will show below that Levy was not "substantially prejudiced."

2. But even employing the stricter standard of review suggested by the court below, Levy received a fair trial on the charge that he willfully disobeyed Colonel Fancy's order "to establish and operate a Phase II Training Program for Special Forces Aid-Men in dermatology * * *." (J.S. App. A, p. 2a). The central inquiry is whether the joint trial affected the ability of the fact-finders to evaluate Levy's defense under the Article 90 charge that the order was illegal because motivated solely by a desire to increase possible punishment.¹⁷ In view of the evidence properly admitted on this charge, which is set forth in the Statement (*supra*, pp. 4-8), it cannot reasonably be argued that a separate trial of the charge would have diminished the force of what Judge Seitz de-

¹⁷ Levy in fact did not obey the order and his counsel at trial never contended that Levy had done so. In addition to arguing improper motivation by Colonel Fancy in issuing the order, Levy argued that the order was unlawful because it required

scribed as the "overwhelming evidence that the order did not have as its primary motive the increasing [of] defendant's punishment" (J.S. App. A, p. 91a). As Judge Seitz stated (*ibid.*):

[n]ot only did the court-martial have the benefit of extensive testimony by Colonel Fancy, the commanding officer of the hospital, who gave the order, but it had the benefit of examining the order of events in reaching a sustainable conclusion on this point. These events showed that while the order was given in early October, Colonel Fancy continued his efforts to persuade Captain Levy to comply with the order even after the initial refusal to obey. Only after several attempts at such persuasion had been rejected by Captain Levy did Colonel Fancy finally press charges. Colonel Fancy initiated this action in November, a month after the giving of and initial refusal to comply with the order. The court was not presented with a situation where the order was given one day and the charge drawn up the next.

him to commit a war crime. This point was tried outside the hearing of the court-martial, before the law officer. The law officer determined the point against Levy as a matter of law and it was never submitted to the court-martial. As the majority opinion noted, "there never was any showing that the medical training [Levy] was ordered to give had any connection whatsoever with the perpetration of any war crime" (J.S. App. A, p. 53a).

Levy also argued that the order illegally forced him to violate his medical ethics. This defense is not recognized under the UCMJ, and the law officer instructed the court that such a conflict, even if proved, did not entitle Levy to an acquittal.

We note further, as did Judge Seitz (J.S. App. A, p. 92a), that of the five charges brought against Captain Levy, the court convicted him of lesser offenses on two (tantamount to an acquittal under the UCMJ). Such discrimination as to the evidence relating to each charge shows that the fact-finders were not prejudiced by the evidence introduced on the General Articles charges. Finally, much of the allegedly inflammatory evidence introduced in the court-martial was brought out by the defense in trying to establish improper motivation. It is difficult to see how on retrial Levy would be able to prove improper motivation—the defense to which he would be relegated at a future trial (see J.S. App. A, p. 93a)—without eliciting much the same evidence.

To reverse the Article 90 conviction on the facts of this case would bar the joinder of charges permitted by the Uniform Code of Military Justice—and approved by this Court, *e.g.*, *Carter v. McClaughry*, *supra*, 183 U.S. at 386—in many cases in which a defendant is acquitted on one charge. The practical result will be to require separate trials on charges that do not arise from the same transaction. That is not the procedure Congress authorized, and there is no reason to impose such a requirement on the court-martial system.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed and the complaint dismissed.

Respectfully submitted.

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